STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
MARIA PEREZ,	)	
	)	
	)	
Complainant,	)	CHARGE NO(S): 2007CA0347
	)	EEOC NO(S): 21BA62477
and	)	ALS NO(S): 07-660
	)	
COMMONWEALTH EDISON CO.,	)	
	)	
	)	
Respondent.	)	

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION) Entered this 9th day of February 2010

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

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MARIA PEREZ,	)	
	)	**Charge No. 2007CA0347**
Complainant,	)	**EEOC No. 21BA62477**
	)	**ALS No. 07-660**
and	)	
	)	
COMMONWEALTH EDISON CO.,	)	
	)	**Judge Reva S. Bauch**
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes before the Commission on Respondent's Motion for Summary Decision ("Motion"). Complainant filed a Response. Respondent filed a Reply. Accordingly, this matter is now ripe for a decision.

The Illinois Department of Human Rights ("Department") is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

Findings of Fact

The following facts were derived from uncontested sections of the pleadings or from uncontested sections of the affidavits and other documentation submitted by the parties. The findings did not require, and were not the result of, credibility determinations. All evidence was viewed in the light most favorable to Complainant. Facts not stated herein are not deemed material.

1. Respondent is a public utility that distributes electricity in northern Illinois.

2. Respondent charges customers based on the amount of electricity used per month.

3. For residential and small business customers, usage is determined by physically reading a meter at the customer's location.

4. Respondent employs meter readers to read meters at its customers' locations.

5. Meter readers are usually assigned the same routes from month to month so they become familiar with the routes and meter locations.

6. Giving regular routes month to month achieves greater productivity.

7. Each morning, a meter reader is given a route loaded into a handheld computer, along with available information about the meter location, customer preferences and other information, if available.

8. As a meter reader reads the meters, he/she enters the meter reading into the handheld and that information is then downloaded into Respondent's computers at the end of the day.

9. Most routes are walking routes, where the meter reader drives or is driven to a starting point, walks from one meter to the next, and then drives or is driven back to the reporting center at the end of the shift.

10. If a meter is not read, Respondent must estimate the customer's energy usage, which can result in overpayment or underpayment.

11. Overpayment and underpayment can cause customer dissatisfaction.

12. When a meter is not read, Respondent can send a meter reader out again, but doing so is inefficient and costly.

13. Complainant began working for Respondent in June 1999 as an office service representative.

14. Complainant was laid off, but was able to exercise recall rights.

15. Complainant did not go back to her office service representative job when recalled.

16. In May 2006, Complainant was re-hired as a meter reader.

17. Meter readers are considered entry-level positions.

18. Complainant was given a comprehensive training module, called Meter Pro, which taught her how to read meters.

19. After her "classroom-type training," Complainant received five days of field training with an experienced meter reader before she was given the responsibility for reading meters on her own.

20. On May 22, 2006, Complainant's supervisor, Carin Larsen, had a "coaching session" with Complainant because Complainant had written down in her handheld that she had missed 57 meters because of dogs.

21. In most of the cases, the information loaded onto the handheld did indicate that at one time there had been a dog on the premises for these missed meter locations.

22. During the May 22, 2006 "coaching session," Larson went over the Respondent's "dog policy" for the Meter Reader Department.

23. The "dog policy" states that if there is a loose dog on the premises, the meter reader is to ring the doorbell and have the customer secure the dog.

24. If the customer cannot secure the dog, the meter reader is to attempt to read the meter without entering the yard with the dog.

25. One way to read the meter would be to use binoculars.

26. If the meter reader cannot read the meter without a risk of being attacked by the dog, the meter reader is to enter "can't read – dog" in the handheld and come back to the meter later that day.

27. Larson told Complainant that entering "can't read – dog" when there is no loose dog is considered a falsification of Respondent's documents, a terminable offense.

28. The next day, Larson repeated this same "dog policy" lesson for all employees under her supervision in a meeting called a "tailgate."

29. All of Larson's employees, including Complainant, confirmed that the improper use of a "can't read" code is falsification and a terminable offense.

30. On June 17, 2006, Complainant's podiatrist diagnosed her with an ankle condition called "Sinus Tarsi Syndrome."

31. Complainant's doctor stated that Complainant does not need surgery for her ankle, and that it can be treated using anti-inflammatory medications and orthotics.

32. Complainant's doctor stated that Complainant could go back to meter reading on June 29, 2006, as long as she spent no more than four hours at a time walking on her route.

33. Complainant was expected to read half the meters of a person on an eight hour shift.

34. On June 30, 2006, Complainant reported that she could not read 53 meters on her 4-hour shift because there was a dog in a yard or a gate was locked.

35. On July 3, 2006 and on July 5, 2006, Complainant was given the same route to read.

36. The assignment for the July 3 and July 5, 2006, was to read the meters she had not been able to read on June 30, 2006, as well as to read the meters she had failed to read because of a dog or hazard.

37. Regarding the July 3, 2006 and July 5, 2006, readings, Complainant maintained that it was impossible to read most of the 53 meters.

38. Complainant also added 23 new "can't read" codes, for a total of 80 "can't read" codes over three days on the same route.

39. On July 6, 2006, Respondent had another meter reader read the meters that Complainant missed.

40. Complainant's supervisor contacted property owners and personally inspected the locations where Complainant had reported she could not read the meters.

41. With one exception, the substitute meter reader was able to read the meters that Complainant had reported as "can't read."

42. In many cases, Complainant's supervisor had found from her investigation that there were no dogs, or that the meter could be read easily from the adjoining properties.

43. In many instances, Complainant's supervisor could touch the meter in question across the fence from the yard next door.

44. On August 14, 2006, Complainant's supervisor, Larson, held a "fact-finding" meeting with Complainant.

45. "Fact-finding" meetings are conducted when Respondent's supervisors believe an employee may have done something that warrants discipline.

46. Larson had prepared a spreadsheet for the "fact-finding" meeting that showed each missed meter and Complainant's reason for not reading the meter.

47. The spreadsheet also indicated the meters that the substitute meter reader was able to read.

48. In the meeting, Complainant indicated that (a) she was really afraid of dogs; (b) she had not been properly trained; and (c) she tried the best she could.

49. After hearing Complainant's responses, Larson suspended Complainant pending the results of the consensus call with the human resources and labor relations departments.

50. Larson collected Complainant's ID's and obtained a contact telephone number so that she could inform Complainant of the final decision.

51. Shortly thereafter, line management in the meter reading department requested that Complainant be terminated.

52. The termination recommendation was based on the fact that management concluded Complainant entered false "can't read" reasons for a majority of her meter reads.

53. Respondent's management also concluded that Complainant had violated Exelon Energy Delivery Employee Standards of Conduct #1 and #28.

54. Respondent contacted Complainant and informed her that she was terminated.

55. By letter dated September 19, 2006, Respondent confirmed that Complainant had been terminated.

56. Complainant filed a Charge with the Department on August 17, 2006, alleging harassment and wrongful suspension based on age, ancestry, sex and physical disability.

57. On October 3, 2006, amended her Charge to include claims for wrongful discharge based on age, sex, national origin and physical disability.

58. August 27, 2007, Complainant filed this Complaint with the Commission fully incorporating her Charge.

Conclusions of Law

1. Complainant is an "aggrieved party" and Respondent is an "employer" as those terms are defined in the Illinois Human Rights Act ("Act"), 775 ILCS 5/1-103(B) and 5/2-101(B).

2. The Commission has jurisdiction over the parties and the subject matter of this action.

3. Complainant failed to establish a *prima facie* case for harassment based on age, ancestry, sex or physical disability discrimination.

4. Complainant failed to establish a *prima facie* case for wrongful suspension based on age, ancestry, sex or physical disability discrimination.

5. Complainant failed to establish a *prima facie* case for wrongful discharge based on age, sex, national origin or physical disability.

6. Respondent has articulated a legitimate, nondiscriminatory reason for discharging Complainant.

7. Complainant has failed to show that Respondent's reason is a pretext for discrimination.

Discussion

I. *Standards for Summary Decision*

Under Section 8-106.1 of Act, either party to a complaint may move for summary decision. **775 ILCS 5/8-106.1**. *See also* **86 Ill. Admin. Code §5300.735.** A summary decision is the administrative agency procedural analog to the motion for summary judgment in the Code of Civil Procedure. **Cano v. Village of Dolton, 250 Ill App3d 130 (1993).** Such a motion should be granted when there is no genuine issue of material fact and the undisputed facts entitle the moving party to a recommended order in its favor as a matter of law. **Fitzpatrick v. Human Rights Comm'n, 267 Ill App3d 386 (1994)**. The purpose of a summary judgment is not to be a substitute for trial but, rather, to determine whether a triable issue of fact exists. **Herrschner v. Xttrium Lab. Inc., 26 Ill App3d (1969)**. All pleadings, depositions, affidavits, interrogatories and admissions must be strictly construed against the moving party and liberally construed against the nonmoving party. **Kolakowski v. Voris, 76 Ill App3d 453 (1979)**. If the facts are not in dispute, inferences may be drawn from undisputed facts to determine if the movant is entitled to judgment as a matter of law. **Turner v. Roesner, 193 Ill App3d 482 (1990)**. Where the facts are susceptible to two or more inferences, reasonable inferences must be drawn in favor of the nonmoving party. **Purdy County of Illinois v. Transportation Insurance Co., Inc., 209 Ill App3d 519 (1991)**. Although not required to prove his/her case as if at hearing, a nonmoving party must provide *some* factual basis for denying the motion. **Birck v. City of Quincy, 241 Ill App3d 119 (1993).** Only evidentiary facts, and not mere conclusions of law, should be considered. **Chevrie v. Gruesen, 208 Ill App3d 881 (1991)**. If a respondent supplies sworn facts that, if uncontradicted, warrant judgment in its favor as a matter of law, a complainant may not rest on his/her pleadings

to create a genuine issue of material fact. **Fitzpatrick at 392.** Where the moving party's affidavits stand uncontradicted, the facts contained therein must be accepted as true and, therefore, the failure to oppose a summary judgment motion supported by affidavits by filing counter-affidavits in response is frequently fatal. **Rotzoll v. Overhead Door Corp., 289 Ill App3d 410 (1997).** Summary decision is a drastic means of resolving litigation and should be granted only if the right of the movant to judgment is clear and free from doubt. **Purtill v. Hess, 111 Ill2d 229 (1986).**

II. *Analysis*

There are two main methods to prove an employment discrimination case, direct and indirect. Either one or both may be used. **Sola v. Human Rights Comm'n, 316 Ill App3d 528 (2000).** Since there is no direct evidence in this case, the indirect analysis will be used. The method of proving a charge of discrimination through indirect means was described in the U.S. Supreme Court case of **McDonnell Douglas Corp. v. Green, 411 US 792 (1973)**, and is well-established.

First, the Complainant must establish a *prima facie* showing of discrimination against her by Respondent. If she does, Respondent must articulate a legitimate, non-discriminatory reason for its actions. If this is done, the Complainant must prove by a preponderance of the evidence that the articulated reason advanced by the Respondent is a pretext. *See* **Texas Dep't. of Community Affairs v. Burdine, 450 US 248, 254-55 (1981).** This method of proof has been adopted by the Commission and approved by the Illinois Supreme Court. **Zaderaka v. Human Rights Comm'n, 131 Ill2d 172 (1989).**

Complainant filed a Charge on August 17, 2006 alleging harassment on July 18, 2006 because of age, ancestry, sex and physical disability. In addition, Complainant alleged she was wrongfully suspended on August 14, 2006 because of age, ancestry, sex and physical disability. On October 3, 2006, Complainant amended her Charge to include that she was wrongfully discharged on September 19, 2006 because of her age,

sex, national origin and physical disability. Complainant filed a Complaint with the Commission on August 7, 2007, incorporating the original Charge and the amended Charge.

Complainant was suspended pending an investigation into the alleged falsification of work records. After the Respondent conducted an investigation and processed the collected information, Complainant was discharged. Thus, as Respondent correctly argues, the suspension merged into the discharge. Accordingly, the four claims relating to the August 14, 2006, suspension should be dismissed because they do not state separate claims under the Act. Given the foregoing, the remaining claims at issue are the harassment claims and the wrongful discharge claims.

To establish a *prima facie* case for harassment, Complainant must demonstrate: (1) she was subject to unwelcome harassment; (2) the harassment was based on her protected classification (*e.g.*, age, ancestry, race); (3) the harassment was severe and pervasive enough to alter the conditions of her environment and create a hostile and abusive working environment; and (4) there is a basis for employer liability. **Beamon v. Marshall & Ilsley Trust Co., 411 F3d 854 (7th Cir. 2005).** A hostile environment based on race, or other protected classification, should be analyzed like a hostile environment based on sex. **Trayling at 10-11.** The Complaint alleges harassment on one date only, July 18, 2006. Complainant states in her response to this motion that there were many acts of harassment, some of which related to sex, and possibly other protected classifications, prior to the July 18, 2006 and thereafter, but these incidents were not included in the Charge and Complaint because of the Department's mistake. Complainant also indicates that she shared dates and times of harassment with her union representative when filing a grievance on the July 18, 2006 date stated in the Charge. Complainant states that she provided the detailed harassment incidents by date and time in her discovery responses.

Complainant signed the Charge and is held accountable for its content. If the Charge omitted certain key information, Complainant could have requested revisions and refused to execute it until it was accurate. Thus, I will only consider the alleged harassment on July 18, 2006: someone telling Complainant she was doing a poor job. I do not find that this single incident rises to the level of harassment because it was not severe and pervasive enough to alter the conditions of Complainant's environment and create a hostile and abusive working environment. In addition, Complainant has failed to show how the alleged harassment relates to age, sex, ancestry or physical disability, as set forth in her Complaint.

As to the wrongful discharge claims based on age, sex, national origin and physical handicap, I find Complainant has failed to demonstrate a *prima facie* case for several reasons. In general, to establish a *prima facie* case for sex, age or national origin discrimination, Complainant must prove: (1) she is in a protected class; (2) she was meeting Respondent's legitimate performance expectations; (3) Respondent took an adverse action against her; and (4) similarly situated employees outside Complainant's protected class were treated more favorably. Complainant provides no evidence that similarly situated meter readers outside the four protected classifications were treated differently (*e.g.,* not fired for similar acts). Complainant also fails to provide evidence that she was meeting Respondent's legitimate performance expectations.

To prove a claim for physical disability, the Complainant must prove: (1) she is "disabled" within the meaning of the Act; (2) her disability is unrelated to her ability to perform her job, or if the disability is related to that ability to perform, after her request, Respondent did not make reasonable accommodations to perform her job; and (3) Respondent took adverse action against her because of her disability. Complainant has not demonstrated that her condition meets the definition of "handicap" or "disability" under the Act. Complainant was medically cleared by her own doctor to walk,

notwithstanding her ankle pain, for four hours straight. Such a condition is transitory and insubstantial and does not meet the test under the Act. In any event, Respondent did accommodate Complainant by assigning her to read only half the number of meters of readers who were working eight-hour days. Complainant also fails to provide any evidence that she was discharged because of her alleged disability and because she failed to get to the meters. Rather, the evidence indicates that Complainant was discharged because she claimed she could not read approximately 80 meters due to gates or dogs.

Whether or not Complainant has demonstrated that she can establish a *prima facie* case for harassment based on age, sex, ancestry or physical disability or wrongful discharged based on age, sex national origin or physical disability, however, is not fatal. In its submissions, Respondent articulated a legitimate, non-discriminatory reason for its actions. Once such a reason is articulated, there is no need for a *prima facie* case. Instead, at that point, the decisive issue in the case becomes whether the articulated reason is pretextual. **Clyde and Caterpillar, Inc., 52 Ill HRC Rep. 8 (1989),** *aff'd sub nom* **Clyde v. Human Rights Comm'n, 206 Ill App3d 283 (1990).**

Respondent's submissions are replete with facts documenting that Respondent believed that Complainant's representations as to why she could not read the meters were false. Respondent believed that Complainant was either making deliberate misrepresentations in her work report or that she was simply not performing her job well, or both.[1]

To support its reasons for discharging Complainant, Respondent relies primarily on the Carin Larson Affidavit ("Larson Affidavit"), and its attached exhibits. The first

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[1] Even if Respondent's stated nondiscriminatory reason in terminating Complainant is incorrect, the focus is on whether Respondent honestly believed that reason to be true. **Forrester v. Rauland-Borg. Corp., 453 F3d 416 (7th Cir. 2006).**

exhibit is a spreadsheet prepared by Ms. Larson that is based on the information Complainant had put into her handheld, the readings from the pick-up meter reader, and the results of Ms. Larson's own investigation. The second exhibit contains detailed notes of a fact-finding meeting with the Complainant, Ms. Larson, a union representative, and other members of management. The Larson Affidavit is in compliance with Supreme Court Rule 191(a); the exhibits were authenticated and a proper foundation was laid for admission into evidence through the sworn affidavit.

Complainant has failed to raise any factual issue which might suggest that Respondent's articulation is pretextual. Although not required to prove her case as if at hearing, Complainant must provide *some* factual basis for denying the motion. *Supra,* **Birck at 123**. Regarding the Larson Affidavit, Complainant states in her response that Larson's sworn statements as to Complainant's training are incorrect. She states she was not properly trained. However, Complainant fails to submit a counter affidavit supporting her allegations.

As to the spreadsheet and fact-finding notes, Complainant does not dispute their authenticity. In fact, she states in her response to the motion that "I have no evidence to support this spreadsheet." Complainant then states that the accuracy of the contents of the spreadsheet is essentially "her word against mine." She admits that she cannot verify or check certain information or check for herself if the spreadsheet is accurate or not. As to the fact-finding notes, Complainant argues in her response that Larson is lying when she says that Complainant was fully aware of the Respondent's expectations and that she was properly trained. Again, Complainant makes many statements and arguments in her response to the motion, but fails to submit her own counter affidavit or other admissible evidence to create any issue of dispute as to material facts.

Respondent submitted several affidavits to support its position, as well as other admissible evidence. Complainant failed to contradict these facts with counter affidavits

or other documentation. Complainant could have submitted her own affidavit, but opted not do so. Failure to submit counter affidavits is frequently fatal. *Supra*, **Rotzoll at 7**. Complainant also references her answers to interrogatories to support her position. However, these answers were not made under oath or submitted with a verification page and therefore may not be considered for purposes of this Motion for Summary Decision. In addition, Complainant may not rest on her pleadings once Respondent supplies sworn facts warranting a decision in its favor. Furthermore, because Respondent's affidavits stand uncontradicted, the Commission must accept, as true, the facts contained therein. ***Id* at 416.** Any grievance sheets submitted to the union are not properly admissible for the Commission to consider. The fact that Complainant may not be able to provide affidavits of Mike Niedzela or Julie Dejesus, witnesses she discusses in her response, did not preclude her from submitting her own affidavit.

Recommendation

Based on the foregoing, there is no admissible evidence that the Commission may consider that creates a genuine issue of material fact. Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, I recommend that the Complaint be dismissed in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY:_____

REVA S. BAUCH
DEPUTY ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: February 27, 2009